Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PAUL FREDERICK GOETZ,

PETITIONER,

v.

JEAN TORDOFF, HARRISON B. TORDOFF, KATHRYN RUTH BRUSH, ALLAN R. KING, JUDITH S. PRYOR, KATHY MADORE, MERRILL LYNCH REALTY OPERATING PARTNERSHIP, L.P., JAMES J. LAWTON III, MARTY D. LONG,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit Court of Appeals is establishing policies which effectively gives it the power to destroy First Amendment and Fifth Amendment rights to petition the government for the redress of grievances, to have meaningful access to the courts, and not to be deprived of property without due process of law.

2. Whether the Eighth Circuit Court of Appeals has ruled in conflict with this Court and other circuits regarding requisite notice before entering summary judgment and terminating property rights.

3. Whether the Eighth Circuit Court of Appeals has so far departed from the principles of this Court as to call for an exercise of supervisory powers.

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PARTIES

The caption contains the names of all parties below.

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RESPONDENTS.

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PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI

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Petitioner, Paul Frederick Goetz, respectfully requests that a writ of certiorari issue to review the April 13, 1994 judgment of the Eighth Circuit Court of Appeals, and the May 25, 1994 denial

of a petition for rehearing.

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OPINIONS BELOW

The opinion and judgment of the Eighth Circuit Court of Appeals, dated April 13, 1994, is reprinted in the Appendix at A2.

The Eighth Circuit's Order denying a petition for rehearing, dated May 25, 1994, is reprinted in the Appendix at A9.

The Memorandum Opinion/Judgment of the Minnesota District Court is reprinted in the Appendix, at A10.

The Memorandum Opinion/Order of the Minnesota District Court denying post judgment motions to open and amend its judgment and for leave to amend the Complaint is reprinted in the Appendix at A41.

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STATEMENT OF JURISDICTION

Petitioner seeks review of the decision of the Eighth Circuit Court of Appeals of April 13, 1994, and the denial of a petition for rehearing, dated May 25, 1994.

This petition is filed within ninety days of the filing of the denial of the petition for rehearing. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

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CONSTITUTIONAL PROVISIONS, STATUTES & RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law...abridging.. the right of the people...to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides in pertinent

part,

> No person shall be...deprived of life, liberty, or property, without due process of law;....

Rule 12(b)(6) of the Fed. R. Civ. P. provides,

> If on a motion...to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56(c) of the Fed. R. Civ. P. provides, in pertinent part,

> The motion shall be served at least 10 days before the time fixed for the hearing.

Minnesota Statute M.S.A 507.02 provides,

> If the owner is married, no conveyance of the homestead...shall be valid without the signature of both spouses.

Minnesota Statute M.S.A. 519.06 provides,

> No contract between husband and wife relative to the real estate of either,

> or any interest therein, nor any power of attorney or other authority from the one to the other to convey real estate, or any interest therein shall be valid....

Rule 1 of the Minn. R. Civ. P. provides,

> These rules govern...with the exceptions stated in rule 81.

Rule 81.01(a) of the Minn. R. Civ. P. provides, in pertinent part,

> These rules do not govern...procedure in the statutory and other proceedings listed in Appendix A insofar as they are inconsistent or in conclict with the rules.

APPENDIX A

Divorce

Rule 9.01 of the Fourth Judicial Dist. Spec. R. of Practice (at the time of the actions involved) provided,

> The Minnesota Rules of Civil Procedure...will apply to the Family Law practice except where they are in conflict with applicable statutes.

Rule 70 of the Minn. R. Civ. P. provides in pertinent part,

> If a judgment directs a party to

> execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done...by some other person appointed by the court, and the act when so done has like effect as if done by the party.

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STATEMENT OF THE CASE

INTRODUCTION

The merits of the case involve an ordinary citizens' rights and liberties in the possession and enjoyment of his homestead property, something this Court has long recognized in a variety of situations. City of Ladue v. Gilleo, 114 S Ct 2038, 2047 (1994); Payton v. New York, 445 U.S. 573, 596-7, nn. 44-45, 100 S.Ct. 1371, 1385-6 (1980). And the interference of those rights under color of state law, as defined by 42 U.S.C. section 1983, and as interpreted by this Court on numerous occasions.

The petitioner purchased a house by contract for deed in 1983, which became his homestead. He claims that his contract for deed for his homestead is still valid in accordance with all of the laws of the State of Minnesota, and that the respondents, under color of state law, in the form of the usurpation and abuse of power by state judges, have interfered with his rights and liberties in the enjoyment, occupancy, and disposition of his homestead.

This petition, however, is concerned, with the manner in which the case was disposed, and how the procedures of the lower courts have infringed fundamental constitutional rights, and eroded the spirit of the Federal Rules of Civil Procedure, and how the lower courts have made rulings which are in conflict with controlling precedents of this Court, and in conflict with policies of other circuits.

THE ORIGINS OF THE COMPLAINT

In September 1989 the petitioner filed for a dissolution of his marriage from respondent Brush, and, according to law, all rights and liberties involving the homestead were placed under the jurisdiction of the state court. In January 1990 the state court granted Brush's request to have the homestead sold during the pendancy of the proceeding.

The respondents, acting in various capacities, then attempted to force the petitioner, against his will, to sign over his homestead for $37,400 to respondent Jean Tordoff, long time friend of Brush, while the respondents concealed buyers attempting to buy the house for $73,000.

The respondents later altered the dates on an earnest money check for $3500 and a Purchase Agreement for $73,000. The depositions of the prospective buyers, and copies of the documents were presented

to district court as exhibits.

When the petitioner refused to sign his house over to his wife's friend, respondent Lawton, attorney for Brush, without notice to the petitioner, met secretly with a state judge who, on February 9, 1990, issued an ex-parte order, allegedly pursuant to Rule 70 of the Minn. R. Civ. P., granting Brush permission to sign the petitioner's name to documents regarding the "sale" of his homestead.

Brush then signed the petitioner's name to an Assignment of Contract for Deed to her friend, Jean Tordoff. The Merrill Lynch Realty respondents then pulled out the documents of the buyers attempting to buy the house for $73,000, and changed the dates on their earnest money check and purchase agreement, to make it appear as if the offer was made after the ex-parte order was issued, instead of 4 days before it was issued.

The respondents then attempted a

"transaction" between Tordoff and the mystery buyers, with a quick $30,000 profit in FHA loan money to go to Brush, via Tordoff (instead of having the petitioner and his wife sell the house, and having the $30,000 placed under the jurisdiction of the dissolution court, and divided pursuant to statute).

The buyers, however, got suspicious and bailed out. And, in stepped respondent Marty Long. During the pendancy of the dissolution proceeding, prior to any inkling of a final judgment, Brush moved out of the homestead, and Long moved in. The respondents used the house as a vehicle to acquire FHA loan money, approximately $30,000 of which they gave to Brush, via the Tordoffs, undetected by any court documents.

In June 1991, still during the dissolution proceeding, the petitioner filed and served a written motion seeking exclusive right to title and occupancy

of his homestead, to be heard at the trial in the dissolution action, pointing out the invalid nature of the documents signed by Brush, by various express statutes and rules of procedure, the Minnesota Supreme Court's unwavering support of the statutes prohibiting the signing of his name by his wife, along with the actions of the respondents.

But, the trial judge refused to allow the petitioner's witnesses to testify, refused to allow him to introduce documents, and refused to adjudicate the motion for title and possession of his homestead.

A copy of the written motion was presented as an exhibit to district court, and discussed in memoranda, and the issue was again raised in the Court of Appeals. But neither district court nor the 8th Circuit has ever made reference to it.

The petitioner attempted an appeal, but was dismissed from the Minnesota Court of Appeals, with no notice of any hearing,

no hearing, and no opportunity to present his case, when the Court of Appeals appointed the trial judge as a "special" Court of Appeals Referee.

The issue of the attempted appeal and dismissal was also raised in both district court and the Court of Appeals, but neither has ever made reference to it in their written opinions.

The petitioner filed suit against the respondents in Ramsey County District Court (the county in which his homestead is located). (The dissolution action was in Hennepin County.) And the Tordoffs filed a counterclaim against the petitioner in that action.

In October 1990, after a brief hearing in the judge's chambers, the petitioner's claim was dismissed for defective pleadings. Also, the homestead was still under the jurisdiction of the Hennepin County Family Court.

In October, 1991, the plaintiff served

and filed a written motion to dismiss the counterclaim of the Tordoff's. But the state judge refused to adjudicate his written motion, and granted a partial judgment in favor of the Tordoff's.

The second unadjudicated written motion was also presented to district court as an exhibit in this action, and discussed in memoranda, and also in the Appellate Briefs. But neither district court nor the 8th Circuit has ever mentioned it in their written opinions.

COURSE OF THE PROCEEDINGS BELOW

Subsequently the petitioner filed this action, relying on 28 U.S.C. sections 1331 & 1343 for jurisdiction in district court. The COMPLAINT is reprinted in the Appendix at A43.

The case was commenced with the filing of the Complaint in district court on September 18, 1992. The Summons and Complaint were served on the respondents on November

18 & 19, 1992.

Two groups of defendants brought motions to dismiss pursuant to Rule 12(b)(6). And the petitioner then filed cross-motions for declaratory judgments. There was no discovery attempted by either party prior to a scheduled hearing on January 19, 1993. With the Thanksgiving, Christmas, and New Years holidays, discovery prior to the hearing would have been almost impossible.

The issue of whether Merrill Lynch had or had not been legally served with process was not even mentioned at the hearing, let alone discussed. And there was no motion of any sort before the court on their behalf. However, with no indication whatsoever from district court that it was contemplating dismissing the claims against Merrill Lynch, three weeks later, sua sponte, it dismissed the petitioner's claims against Merrill Lynch.

And, with no indication whatsoever, from district court, at any time, that

it was contemplating summary judgment in favor of the other respondents, district court issued an order for summary judgment and dismissal with prejudice, sua sponte, on February 9, 1993.

Timely motions to open and amend the judgment, either for leave to amend the Complaint, to include a Fourth Amendment claim of unreasonable seizure, and to add several state judges as defendants; or in the alternative, for reconsideration of the 42 U.S.C. section 1983 portion of the complaint, were served on February 25, 1993, and timely filed. An order denying the post judgment motions was issued and filed on March 9, 1993.

No reasons were given for denying the motions. (App. at A41).

An appeal was filed on March 9, 1993. The decisions of district court were affirmed on April 13, 1994.

A timely petition for rehearing was filed on April 28, 1994. (The 14 days

for filing, pursuant to the FRAP fell on April 27, 1994, a day on which federal offices were closed.)

Both were denied on May 25, 1994.

Neither district court nor the 8th Circuit has ever stated any reason for denying leave to amend the Complaint.

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REASONS FOR GRANTING THE WRIT

I. ALTHOUGH THIS COURT HAS CONSISTENTLY REINFORCED THE NOTICE COMPONENT OF DUE PROCESS OF LAW THE EIGHTH CIRCUIT IS ERODING THE FUNDAMENTAL ELEMENT.

The underlying purpose of the Federal Rules of Civil Procedure is to enhance and compliment fundamental constitutional rights, and to ensure fair play and predictability and due process of law to all litigants. The Constitution has been around longer than the FRCP. And all of the rules must be read in light of fundamental rights.

The right to petition the government for the redress of grievances, and the right of a meaningful access to the courts, and the right to not be deprived of property without due process of law would all be of little meaning if courts were free to manipulate Rule 12(b)(6) of the Fed. R. Civ. P. to kick litigants out of court without notice and an opportunity to be heard.

If courts disposed of cases without notice, without hearings, without discovery of any sort, and then wrote legally impossible opinions based upon no evidence of record what would that say about the nation's judiciary branch? That is precisely what the 8th Circuit Court of Appeals has sanctioned and done, however.

This Court has consistently held that "**actual notice**" is a fundamental requisite of due process of law before terminating property rights. Tulsa Collection Serv. v. Pope, 485 U.S. 478, 485 (1988), quoting

Mennonite Board of Missions v. Adams, 462 U.S. 791, 800 (1983). Also, Peralta v. Heights Medical Center, 485 U.S. 80 (1988).

And this Court has also held that a cause of action is a species of property protected by the Constitution. Tulsa, at 485, citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

And, that "an significant taking of property...is within the purview of the Due Process Clause". Connecticut v. Doehr, 111 S Ct 2105, 2115 (1991), quoting Fuentes v. Shevin , 407 U.S. 67, 86 (1972).

Since summary judgment is usually considered a final determination of property interests and rights there would seem to be no question that actual notice that summary judgment is being contemplated is a mandatory requisite of due process of law. This Court essentially said that in Carter v. Stanton, 405 U.S. 669, 671 (1972). And, again in Celotex v. Catrett, 477 U.S. 317, 326 (1986).

However, going the opposite direction, the 8th Circuit is developing a line of cases in which it simply destroys fundamental rights, whenever it feels like it. "Constructive notice" is all that is necessary now in the 8th Circuit before a district court finally terminates property rights, by entering summary judgment sua sponte. App. at A6, quoting Angel v. Williams, 12 F 3d 786 (8th Cir. 1994).

Now, even with respect to a pro se litigant. If a litigant merely submits a paper outside of the pleadings they are on notice that district court is contemplating summary judgment.

And, while failing to address any of numerous cases from this Court cited by the petitioner in the appellate briefs, and offering no citations of its own, the 8th Circuit has squarely stricken the notice component out of the due process clause of the Fifth Amendment, stating, "Goetz's due process claim regarding the dismissal

is without merit." App. at A6.

Almost every other circuit has held that actual notice from district court is mandatory in almost every instance if it decides to convert motions to dismiss into ones for summary judgment or contemplates entering summary judgment sua sponte. Jones v. Automobile Ins. Co. of Hartford, 917 F 2d 1528, 1531 (11th Cir. 1990); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 480 F 2d 607 (10th Cir. 1973); English v. Cowell, 10 F 3d 434, 437 (7th Cir. 1993); Hickey v. Arkla Industries, Inc., 615 F 2d 239, 240 (5th Cir. 1980); Davis v. Zahradnick, 600 F 2d 458, 460 (4th Cir. 1979); In Re Bristol Industries Corp., 690 F 2d 26, 28 (2nd Cir. 1982).

Granting this petition would give this Court the opportunity to reiterate and reinforce fundamental principles that are wavering and simply disappearing in some instances, and give encouragement and hope to the nation's ordinary people.

If citizens' rights to notice and fundamental fairness, and their right to have meaningful access to the courts are stealthily taken away, it would seem to encourage uncivilized dispute resolution.

II. SOME OF THE OTHER PRACTICES & PROCEDURES USED AND SANCTIONED BY THE EIGHTH CIRCUIT SERIOUSLY DIMINISH THE CREDIBILITY OF THE FEDERAL COURTS.

A. MUCH OF THE CASUALLY MENTIONED FACTUAL PORTION OF THE OPINION IS NOT SUPPORTED BY ANYTHING OF RECORD

None of the respondents claim to have bought a house. None of the respondents claim to have sold a house. And none of the respondents claim to have listed a house for sale with any real estate company. There are no affidavits in the record from any respondent, no depositions from any respondent, no answer to the complaint, no admissions, and no interrogatorites, and there was no testitmony.

There are no documents whatsoever

in the record that indicate any transfer of any ownership interest in the petitioner's homestead to anyone. And there are no real estate documents indicative of ownership in the record whatsoever, except the petitioner's contract for deed.

How then does the panel from the 8th Circuit write, "...she sold the house to Jean and Harrison Tordoff. The Tordoffs subsequently sold the house to Marty Long through Merrill Lynch Realty."?? App. at A3. If the respondents don't even claim to have bought or sold a house, doesn't it seem odd that the Court of Appeals would state it so matter of factly for them?

The 8th Circuit also writes, "Goetz... refused to cooperate in the sale." App. at A3. The simple fact that the statement is made by the 8th Circuit without the aid of any affidavits, depositions, testimony, or discovery of any sort speaks for the credibility of the statement.

And, the 8th Circuit writes, "Goetz

alleged that the defendants sold the house pursuant to the court's orders...". App. at A7. **Nowhere** did the petitioner ever allege that the respondents "sold the house". Not in the Complaint (App. at A43), or in any other papers.

Alleging that the respondents utilized the house to acquire federally insured deposits while the property was under the jurisdiction of a state court and laundered the money out of a pending state action, and that someone is unlawfully living in his house, under color of state law, and that state judges have aided the private parties by issuing orders without authority and by refusing to adjudicate a written motion for title and possession of a homestead, would seem obviously quite different than alleging that someone "sold the house".

It seems like the whole purpose of the judicial process is to give citizens the opportunity, within a set of guidelines,

to gather and present information, and for the courts to then make informed decisions based upon evidence in the record; and that federal courts of appeals should not be allowed to produce gossip and manufacture information.

B. MATERIAL FACTUAL INFORMATION FROM THE OPINION IS LEGALLY IMPOSSIBLE BASED UPON BINDING PRECEDENTS OF THE MINNESOTA SUPREME COURT AND THIS COURT

Minnesota Statutes M.S.A. 507.02, and M.S.A. 519.06, and various rules of procedure, along with countless binding precedents of the Minnesota Supreme Court, make a "sale" of the petitioner's homestead impossible, because no one can alienate a spouse's interest in a homestead, or any other real property.

However, the 8th Circuit has not only ignored the arguments of the petitioner, but wholly ignored the state legislature, the democratic process of the citizens,

the Minnesota Supreme Court, as well as this Court. Salve Regina College v. Russell, 499 U.S. 225, 231 (1991).

C. THE OMISSION OF MATERIAL INFORMATION IN THE OPINION IS INCREDULOUS

The 8th Circuit has not made specific reference to any exhibit in the record, even though the petitioner presented two written motions from state court proceedings, one of them simply for title and possession of his homestead; and claimed that the refusal by the state courts to adjudicate the motions was part of the significant and overt aid and encouragement given the respondents in the deprivation of the petitioner's rights and liberties.

The 8th Circuit, instead, writes, "Action on the part of a private person pursuant to a court order made with the authority of a statute is not sufficient to characterize the person as a state actor." App. at A7. That statement, and the case

from which it comes, would seem to have no relevance whatsover to the refusal of state judges to adjudicate the petitioner's written motions and the aid it has given the respondents.

There are also several state orders at issue in the case, and the petitioner challenged both the authority of the issuing judges and the constitutionality of some of them. However, the 8th Circuit fails to even mention the challenges, or the cases cited by the petitioner in support.

In writing "Action on the part of a private person pursuant to a court order made with the authority of a state statute is not sufficient to characterized the person as a state actor", the 8th Circuit fails to cite any statute which gives a state judge authority to grant anyone permission to sign their spouse's name to a purported alienation of a homestead, or any other real property. Because, not only is there is no such statute, the statutes

declare any such attempt invalid.

So, if there is no such statute, it seems obvious that many of the alleged actions of the respondents could not have been "pursuant to a court order made with the authority of a state statute".

However, by a generalized muddling of the state orders at issue, and no specific reference to the date of any of the alleged actions of the respondents, the 8th Circuit fails to even attempt to show how any alleged action by any respondent could have possibly been "pursuant to a court order made with the authority of a state statute".

There is no specific reference to the date of any order, and no specific reference to the date of any alleged action by even one respondent. And not even a cursory attempt to correlate the timing of any actions with any orders.

And there is no document of record in this case even purporting to be a final judgment from the dissolution action.

The merits of the case, in other words the handling of the homestead in the state courts prior to a final judgment in the dissolution proceeding, rather than fitting Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 157 (1978), as the 8th Circuit suggests, would seem to clearly fit into the "prejudgment remedy" and "usurpation of power" line of cases developed by this Court. Doehr, 111 S Ct at 2112; Lugar, 457 U.S. at 941, and Tulsa, 485 U.S. at 487, with the courts "intimately involved every step of the way".

The 8th Circuit also writes, "The district court did not abuse its discretion in dismissing without prejudice Goetz's claims against Merrill Lynch, as service was defective." App. at A6. However, what the 8th Circuit fails to mention is the fact that district court did so completely sua sponte. And, that there was no determination based upon any judicial proceeding that "service was defective".

There was no hearing, or notice of any hearing, or any request for a showing of information, from anyone, relating to the issue of defective service, or to dismissing claims against Merrill Lynch for any reason.

The 8th Circuit has sanctioned doing away with notice entirely. And, while a dismissal without prejudice may appear to be harmless, it has the effect of terminating claims barred by the statute of limitations after the dismissal. So, now the Minnesota District Court and the 8th Ciruit Court of Appeals have developed and sanctioned a disguised method of terminating property rights with no notice and no hearing. That does not seem like it should be within the "discretion" of a district court.

The 8th Circuit is also now sanctioning flat out refusal to grant leave to amend a complaint. App. at A8. No reasons for denial are necessary. Although this Court

has carefully developed factors to be considered, 'because we said so' is apparently reason enough now in the 8th Circuit. That seems like the antithesis of the holding of this Court in Foman v. Davis, 317 U.S. 178 (1962).

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CONCLUSION

For the foregoing reasons the petition should be granted.

The case is indicative of why some people would rather go to the dentist than simply attempt to resolve a civil dispute in court.

Respectfully submitted,

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August 22, 1994

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-1842

Paul Frederick Goetz,

Appellant,

v.

Appeal from the United States District Court for the District of Minnesota

Jean Tordoff, Harrison B. Tordoff, Kathryn R. Brush, Allan R. King, Judith S. Pryor, Kathy Madore, Merrill Lynch Realty Operating Partnership, L.P., James J. Lawton III, Marty D. Long,

Appellees.

Submitted: March 16, 1994

Filed: April 13, 1994

Before McMILLIAN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Paul Frederick Goetz appeals the district court's disposition of his 42 U.S.C. 1983 and 1985(2) and (3) action. We affirm.

In February 1990, in connection with the dissolution of Goetz's marriage to Kathryn Brush, the Minnesota state court ordered the house, which Goetz previously owned and lived in with his wife, to be sold pursuant to Minn. Stat. 518.58. Goetz unsuccessfully challenged the state court's order and refused to cooperate in the sale. The court appointed Brush as trustee, by authority of Minn. R. Civ. P. 70, and she sold the house to Jean and Harrison Tordoff. The Tordoffs subsequently sold the property to Marty Long, through Merrill Lynch Realty. Goetz filed an action in state court alleging Alan King and other employees of Merrill Lynch/Burnet Realty conspired with Jean Tordoff to sell the house for less than fair market value. The court dismissed

the action with prejudice and awarded attorneys' fees to defendants.

On September 18, 1993, Goetz filed this pro se 42 U.S.C. 1983 and 1985(2) and (3) complaint against his former wife; the subsequent purchasers of the house; the realtor and several of its employees; and his former wife's attorney (collectively referrrd to as defendants), alleging that they had deprived him of his civil rights. Goetz claimed that (1) defendants interfered with his federally protected freedom to contract relative to his homestead property; (2) defendants acted with intentional and reckless disregard for his civil rights, and, except Long, also acted with malicious intent; and (3) defendants, except Long, conspired with intent to obstruct the due course of justice in a state court action. Goetz asked the court for a declaratory judgment declaring the house to be solely his homestead property, and for two million dollars in cost, damages for severe emotional

distress, and punitive damages.

The court dismissed without prejudice the claims against Merrill Lynch because Goetz had failed to serve Merrill Lynch. The district court considered matters outside the pleadings that had been submitted by the parties in addressing the Rule 12(b)(6) motions, and deemed the motions as motions for summary judgment pursuant to Rule 56. The court concluded that Goetz had failed to show a genuine issue of material fact with regard to whether defendants conspired or jointly participated with state officials such that any defendant could fairly be characterized as a state actor. Therefore, as a matter of law, he was not deprived of a constitutional right within the meaning of section 1983.

The court also awarded summary judgment to defendants on Goetz's section 1985 claims. The district court further denied Goetz's motion to amend the complaint after summary judgment was entered.

We hold that Goetz had adequate notice under Federal Rule of Civil Procedure 12(b) of the court's intention to consider matters outside the pleadings. Federal Rule of Civil Procedure 12(b) does not require the district court to give the parties affirmative notice that it intends to consider matters outside the complaint. See Angel v. Williams, 12 F 3d 786, 788 (8th Cir. 1994). Goetz had constructive notice because he, along with other parties, submitted matters outside the pleadings which he understood the district court would consider. See Van Leeuwen v. U.S. Postal Service, 628 F 2d 1093, 1095 (8th Cir. 1980).

The district court did not abuse its discretion in dismissing without prejudice Goetz's claim against Merrill Lynch, as service was defective. See Fed. R. Civ. P. 4(d)(3); Tuepker v. Farmers Home Admin., 525 F Supp 257, 259 (W.D. Mo. 1981), aff'd 684 F 2d 550 (8th Cir. 1982). Goetz's due process claim regarding the dismissal

is without merit.

As to the remaining defendants, summary judgment on Goetz's section 1983 claim was proper. The district court correctly found that Goetz failed to create a genuine issue of material fact "with regard to whether the defendants conspired or engaged in joint participation with state officials to fairly call the defendants state actors". The conduct Goetz alleged arguably makes defendants "state actors" only if it amounts to willful participation in joint activity with the state or its agents. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). Goetz alleged that defendants sold the house pursuant to the court's orders and defended against Goetz's state court actions. Action on the part of a private person pursuant to a court order made with the authority of a state statute is not sufficient to characterized the person as a state actor. Flagg Bros., Inc, v. Brooks, 436 U.S. 149, 157 (1978).

Likewise, "resorting to the courts and being on the winning side of a lawsuit does not make a party...a joint actor...with the State." Dennis v. Sparks, 449 U.S. 24, 28 (1980). As Goetz has failed to show that defendants willfully participated in joint activity with the state, summary judgment was proper.

After a complaint is dismissed, the right to amend under Fed. R. Civ. P. 15(a) terminates. Humphreys v. Roche Biomedical Lab., Inc., 990 F 2d 1078, 1082 (8th Cir. 1993). Therefore, the court did not abuse its discretion in denying Goetz's post-summary judgment motion to amend. Appellees' request for attorneys' fees and costs is denied.

We affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-1842MNST

Paul Frederick Goetz,

Appellant,

vs.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

Jean Tordoff, Harrison B. Tordoff, Kathryn R. Brush, Allan R. King, Judith S. Pryor, Kathy Madore, Merrill Lynch Realty Operating Partnership, L.P., James J. Lawton III, Marty D. Long,

Appellees.

The Suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 25, 1994

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Paul Frederick Goetz,

Plaintiff,

vs.

Civ. No. 3-92-641
MEMORANDUM OPINION AND ORDER

Jean Tordoff, Harrison B. Tordoff, Kathryn R. Brush, Allan R. King, Judith S. Pryor, Kathy Madore, Merrill Lynch Operating Partnership, L.P., James J. Lawton III, and Marty D. Long,

Defendants.

Paul F. Goetz, pro se, for plaintiff.

Wendy J. Wildung and Michael A. Ponto, Faegre & Benson, Minneapolis, Minnesota, for defendants Allan R. King, Judith S. Pryor, and Kathy Madore.

Lee N. Johnson, Merrigan, Johnson, Quayle & Younkin, Minneapolis, Minnesota, for defendants Jean Tordoff, Harrison B. Tordoff, Kathryn R. Brush, Marty D. Long, and James J. Lawton III.

Introduction

Plaintiff Paul Frederick Goetz commenced this action on September 18, 1992, alleging

that the defendants deprived him of his civil rights in violation of 42 U.S.C. sections 1983, 1985(2), and 1985(3) (1988). The above-entitled matter is before the Court on the defendants' Motion to Dismiss and for Sanction and Goetz' Motions for Summary Judgment.[1]

Background

This action arises from a divorce proceeding between Paul Frederick Goetz and Kathryn R. Brush. On September 29, 1989, Goetz filed a petition for dissolution of his marriage to Brush. Brush was represented in that proceeding by defendant James J. Lawton III. During the course

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[1]Burnet Realty, Inc. ("Burnet") joined with defendants King, Pryor and Madore in bringing a Motion to Dismiss. Burnet's belief that it is a party to this action stems from the fact that Goetz served process on Burnet's vice-president Thomas L. Rehman. It is clear, however, that Goetz served Rehman upon the mistaken belief that Rehman was still an agent of Merrill Lynch Realty Operating Partnership, L.P.

of the divorce proceeding, Goetz was ordered to bring current tnd continue to pay the contract for deed payments on him homestead property, located at 638 Holly Avenue, St. Paul, MN (the "Homestead). Subsequently, Goetz was found to have violated that order.

By her Order dated January 24, 1990, Judge Mary Davidson Winter, Hennepin County District Court, Family Court Division, granted Brush's request to order the Homestead sold pursuant to Minn. Stat. 518.58, subd 3 (1988). The court further ordered Goetz to "cooperate" with Brush in the sale of the Homestead, including but not limited to executing any and all documents which would be necessary to complete the sale.

("Merrill Lynch"), which is a party to this action. (See Mem. Opp'n Mots. to Dismiss, at 2.) Accordingly, Goetz has no claims against Burnet and it is not a prty to this action. Furthermore, because Goetz has failed to serve process on Merrill Lynch, see Rehman Aff par. 4, his claims against Merrill Lynch will be dismissed without prejudice. Fed. R. Civ. P. 4(j).

In an order dated February 9, 1990, Judge Davidson Winter determined that Goetz had failed to cooperate and refused to execute any documents. As a result, the court, pursuant to Minn. R. Civ. P. 70, appointed Brush as the Trustee of the Homestead. This action gave her the authority to sign any documents necessay to accomplish the sale of the Homestead, the signing of said documents by Brush to have the like effect as if Goetz had signed them.[2] In an Order dated May 3, 1990, Judge Davidson Winter reaffirmed her February 9, 1990 Order.

Following the February 9, 1990 Order, Brush sold the Homestead to defendants Jean and Harrison Tordoff. Subsequently, the Tordoffs listed the Homestead property for sale with Merrill Lynch and defendants Allan King, Judith Pryor, and Kathy Madore,

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[2] The court found that because the contract for deed was due to be cancelled on February 11, 1990, two days from the date of the order, the sale of the property was necessary to prevent waste of marital assets.

all of whom were employed or agents of Merrill Lynch.

Thereafter, Goetz filed suit in Ramsey County District Court, seeking to void the sale of the property or for monetary relief, on grounds that the sale of the property was improper.[3] The Tordoffs filed a counterclaim against Goetz, alleging that he had improperly executed a mortgatge on teh Homestead in favor of his father, thereby impeding the Homestead's sale.[4] On October 10, 1990, Ramsey County District Judge Otis H. Godfrey Jr. dismissed, with prejudice, Goetz' complaint and ordered Goetz to pay the defendants a total amount

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[3] The defendants in the Ramsey County District Court action were the Tordoffs, Long, Merrill Lynch and Burnet as its successor in interest, First Security Title, Debra Gaffney, Pryor, King, Lawton and Lee N. Johnson.

[4] The mortgage was executed on February 5, 1990, four days prior to the hearing before Judge Davidson Winter and six days prior to the date on which the contract for deed would have been cancelled.

of $1,200 in costs and attorney's fees as a sanction. On October 30, 1991, Ramsey County District Judge Michael T. De Courcy granted the Tordoff's motion to void the mortgage, finding that the mortgage was executed in violation of Minn. Stat. 507.02. Judge De Courcy also ordered Goetz to pay the Tordoff's $150 in attorney's fees.

In his current Complaint, Goetz alleges that the defendants violated his civil rights by depriving him of his right to free use and enjoyment of the Homestead and his freedon to contract in relation to the Homestead. Goetz also alleges that the defendants conspired to deprive him of his right to equal protection through obstruction of the state court proceedings and invidious discrimination based upon his status as a divorcing father. Goetz concludes that these allegations entitle him to relief under 42 U.S.C. sections 1983, 1985(2), and 1985(3). The defendants

seek an order dismissing Goetz' claims. Goetz opposes dismissal of this action and has filed cross-motions for summary judgment wherey he seeks an order voiding any and all transactions concerning the sale of the Homestead and awarding him sole title and right to occupancy.

Discussion

I. Standard of Decision

When passing on a mction to dismiss for failure to state a clamim under Rule 12(b)(6) of the Fed. R. Civ. P., the court accepts as true the material facts alleged in the Complaint and considers the allegations therein in the light most favorable to the non-movant. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The court may dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984; Conley v. Gibson, 355 U.S. 41 (1957).

In this case, the parties have submitted material outside of the pleadings and attachments thereto. In light of the issues in this case and Goetz' status as a pro se party, the Court has considered these submissions in determining the motions now before it. Where matters outside the pleadings are not excluded by a court when passing on a motion to dismiss under Rule 12(b)(6), the motion is deemed to be one for summary judgment under Rule 56. Fed. R. Civ. P. 12(b)(6). The Court further concludes that the parties have had a reasonable opportunity to present all pertinent materials.

Under Rule 56,

> (summary) judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Stated in the negative, summary judgment will be denied

where the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

On a motion for summary judgment, the movant bears the burden of bringing forward sufficient evidence to establish that there are no material issues of fact and that the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The evidence of the non-moving party is to be believed and all justifiable inferences are to be drawn in a light most favorable to that party. Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 587 (1986); Liberty, 477 U.S. at 255; Trnka v. Elanco Prod., 709 F 2d 1223, 1225 (8th Cir. 1983). Where a moving party, with whatever it provides the court, makes and supports a motion for summary judgment in accordance with Rule 56, a party opposing the motion may not rest upon the allegations or denials

of his pleadings; rather, the adverse party's response must "set forth specific facts showing that there is a genuine issue for trial". Liberty Lobby, 407 U. S. at 2516. That is, the party opposing the motion for summary judgment must make a showing sufficient to establish the existence of every element essential to that party's case, and on which that party will bear the burden of proof at trial. Fischer v. NWA, Inc. 883 F 2d 594, 599 (8th cir. 1989). Where a party opposing the motion fails to establish the existence of an essential element, all other facts are immaterial and the moving party is entitled to judgment as a matter of law. Id.

II. Defendent Long's Motion for Judgment

Defendant Long seeks a judgment in his favor based upon the pleadings and pursuant to rule 12(c) of the Fed. R. Civ. P. A motion for judgment on the pleadings may be brought only after the pleadings

have closed. Fed. R. Civ. P. 12(c). Because Long has not filed and served an Answer to the Complaint, his Rule 12(c) motion is improper. However, because the substance of Long's motion reveals that he is claiming that Goetz has failed to alleged a civil rights claim against him as a matter of law, it is appropriate to consider his motion as one to dismiss for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). Accordingly, as the Court has construed the other defendants' motions as motions for summary judgment, it will also examine Long's 12(c) motion under the summary judgment standard, combining its analysis with that pertaining to the remaining defendants.

III. Claims Under 42 U.S.C. section 1983

In his Complaint, Goetz alleges two deprivations of his constitutional rights: (1) his constitutionally protected rights, freedoms, and liberties, in the free use,

enjoyment, and disposal of his homestead property; and (2) his exercise of his federally protected freedon to contract, in regard to his homestead property. Complaint at par. 13, 14. He also claims that the defendants acted under color of state law, including taking actions pursuant to State court orders dated November 2, 1989, November 7, 1989, January 24, 1990, February 9, 1990 and May 3, 1990. Id. at par. 15.

42 U.S.C. section 1983 "is not itself a source of substantive rights, but merely provides for vindicating federal rights elsewhere conferred." Graham v. Connor, 490 U.S. 386, 393-4 (1989). To state a claim under 1983, a plaintiff must allege and prove (1) the deprivation of a specific federal constitutional right, and (2) that the alleged deprivation was committed by a person acting "under color of" state law. West v. Atkins, 487 U.S. 42, 48 (1988). Both elements of a section 1983 claim are

essential and a plaintiff's failure to successfully assert one element will preclude recovery under section 1983.

The defendants are entitled to summary judgment on Goetz' section 1983 claim because as a matter of law, Goetz was not deprived of a constitutional right within the meaning of section 1983. By alleging that his right to free use of the Homestead and freedom to contract were deprived, Goetz is basing his section 1983 claim on rights that are protected only against governmental intrusion.[5] Accordingly, in order to establish an actionable deprivation against the private party defendants, Goetz must show that

[5] In subsequent filings, Goetz has alleged that he was deprived of his liberty and property without due process of law, his right to equal protection, and other federal rights. For purposes of this motion, however, the Court will limit its analysis to the deprivations alleged in Goetz' Complaint and discussed in the defendants' memoranda in support of their motions. The Court notes, however, that these other alleged deprivations are also rights protected only from governmental interference.

the alleged deprivation resulted from "state action." Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982). State action will be established where the "conduct allegedly causing the deprivation of a federal right is fairly attributable to the state."[6] Id. at 937; compare Atkins, 487 U.S. at 49 (discussing "fairly attributable" test under "state action" requirement of deprivation element), and Bahr v. County of Martin, 771 F. Supp 970, 974 (D. Minn. 1991) (discussing "fairly attributable" test in relation to "under color of'" state

[6]Since the Court's decision in Lugar, in section 1983 cases where private party defendants perform an act ordinarily performed by private parties which triggers action by state officials, the defendants' action are committed "under color of" state law if the action qualifies as "state action" under the fourteenth amendment. See Roudybush v. Zabel, 813 F 2d 173, 176 (8th Cir. 1987). Accordingly, where a private party's actions may fairly be attributed to the State, not only will there be state action necessary for the deprivation element, but the private party defendant's actions will have been committed "under color of" state law.

law element).

To establish that a defendant's actions are fairly attributable to the State, a plaintiff must show that (1) the deprivation was caused by the exercise of some right or priviledge created by the state or by a rule of conduct imposed by the State or by a person for whom the State is responsible, and (2) the defendants who allegedly caused the deprivation are persons who "may fairly be said to be state actors." Lugar, 457 U.S. at 937. A person may be a state actor because "he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Id. 102 S Ct at 2754. To withstand the defendants' motions for summary judgment, Goetz must establish that a genuine issue of material fact exists with regard to both the "state authority" and the "state actor" elements.

In this case, this Court cannot conclude

as a matter of law that the alleged deprivation did not result from the exercise of a right or priviledge having its source in state authority. Here, although Goetz' Complaint contains only ambiguous references about the source of the deprivations allegedly visited upon him, his motions for summary judgment and memoranda in support thereof indicated that Goetz is challenging the statutory scheme under which the Minnesota courts ordered the Homestead sold.[7] See Minn. State. M.S.A. 518.58, sub. 3. Although private parties' misuse of a valid state statute or policy does not establish conduct attributable to the State, deprivations allegedly resulting from private parties' proper use of a defective state statute, policy, or scheme does connect an alleged

[7] Specifically, Goetz alleges that the State Court applied Minn. Stat. 518.58, subd 3 (1988), in an unconstitutional manner, thereby issuing an unconstitutional order upon which the defendants relied in selling the Homestead.

deprivation with some State authority. Lugar, 457 U.S. at 941; see Roudybush, 813 F 2d at 177. Accordingly, summary judgment is not appropriate based upon the first element of the fair attribution test.

The centeral issue thus becomes whether the defendants' actions can fairly be said to be those of a "state actor." See Luar, 457 U.S. at 937; Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 157 (1978). Regardless of the claimed deprivation, a private party may be held to be a state actor where he is a "willful participant in joint activity with the State or its agents."[8] U.S. v. Price, 383 U.S. 787, 794 (1966); see Adickes

[8] Three primary tests are employed in determining whether state action was involved for purposes of the deprivation element of a claim under section 1983: (1) the "public function" test (2) the "state compulsion" test and (3) the "nexus/joint action" test. Harvey v. Harvey, 749 F Supp 1118, 1121-22 (N.D. Ga. 1990), aff'd 949 F 2d 1127 (11th Cir. 1992). Here, the nexus or joint action test is the only relevant test.

v. Kress, 398 U.S. 144, 152 (1970). Involvement in a conspiracy between private parties and state officials will also satisfy the joint action test. Bahr v. County of Martin, 771 F Supp 970, 977 (D. Minn. 1991).

The only connections between any of the defendants and State officials which may be gleaned from the Complaint and the current record are (1) defendant Brush's court actions to obtain relief under Minn. Stat. 518.58, subd 3 and Minn.R. Civ. P. 70, (2) her sale of the Homestead pursuant to the February 9, 1990 Order, (3) her opposition to Goetz' objections to that sale, and (4) the defendants' efforts to defend against Goetz' state district court action to void the sale of the Homestead. However, "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or joint actor with a judge" or any other state official. Dennis v. Sparks, 449

U.S. 24, 28 (1980). Similarly, action by a private party pursuant to court orders made with the authority of a presumptively valid state statute is insufficient to justify characterizing that party as a state actor. Flagg Bros., 436 U.S. at 157.

Taking all the facts in the record and reading all permissible inferences in Goetz' favor, his pleadings, affidavits, and other submissions fail to create a genuine issue of material fact with regard to whether the defendants conspired or engaged in joint prticipation with State officials sufficient to fairly call the defendants state actors. See Bahr, 771 F Supp at 977; Neustein v. Orbach, 732 F Supp 333, 346 (E.D.N.Y. 1990). In addition, although Goetz alleged numerous acts of "cover-up" and "concealment" on the part of many of the defendants, Complaint, par. 18-24, such actions between and among private parties, even if conspiratorial, are

unconnected to any State officials and thus can be neither state acton nor action under color of state law. Font v. Dapena Yordan, 763 F Supp 680, 683 n. 3 (D. Puerto Rico). Accordingly, summary judgment will be granted in the defendants' favor on Goetz' claims under 42 U.S.C. section 1983.

IV. Claims Under 42 U.S.C. Section 1985

A. Claims under Section 1985(2)

In his Complaint, Goetz claims that the defendants, with the exception of defendant Long, "conspired with intent to obstruct the due course of justice in a state court action, and to deprive the plaintiff of equal protection of state laws, and his federal Constitutional rights, liberties and freedoms." par. 16. Goetz claims that these allegations state a cause of action under 42 U.S.C. section 1985(2). The defendants seek summary judgment in their favor on this claim.

42 U.S.C. section 1985(2) provides

in pertinent part:

> Or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws,...

This provision, often labelled as section "1985 (2)(II)", creates a cause of action for conspiracies to interfere with state judicial proceeding. In contrast, the preceeding portion of section 1985(2) ("section 1985 (2)(I)"), creates a cause of action for conspiracies to interfere with federal judicial proceedings.

To successfully bring a claim under section 1985(2)(II), the plaintiff must allege and prove "that he was a member of a protected class, that the defendants conspired to deprive him of his constitutional rights, that the defendants acted with class-based, invidiously discriminatory animus, and that he suffered damages as a result of the defendants' actions." Gleason v. McBride, 869 F 2d 688, 694-5

(2nd Cir. 1989); A & A Concrete, Inc. v. White Mtn. Apache Tribe, 676 F 2d 1330, 1333 (9th Cir. 1982). This means in part that under section 1985 (2)(II), "the intended victim (of discrimination) must be a victim not because of any personal malice the conspirators have toward (him), but because of (his) membership in or affiliation with a particualr class." Neustein v. Orbach, 732 F Supp 333, 344 (E.D.N.Y. 1990) (quoting Gleason, 869 F 2d at 695). See Kush v. Rutledge, 460 U.S. 719, 726-7 (1983).

In addition, a plaintiff must allege with sufficient particularity and demonstrate with specific material facts that the parites reached some agreement and conspired together to deprive plaintiff of a federal right. Gometz v. Culwell, 850 F 2d 461, 464 (8th Cir. 1988); see City of Omaha Empl. Betterment Assn'n. v. Omaha, 883 F 2d 650, 652 (8th Cir 1988). Goetz could satisfy this burden by "pointing to at least some facts which would suggest that appellees

reached an understanding to violate (his) rights." City of Omaha, 883 F 2d at 652.

The defendants are entitled to summary judgment on Goetz' claims under 42 U.S.C. section 1985(2). Goetz' Complaint speaks in conclusory terms about the alleged conspiracy. See e.g., par. 16 ("the defendants,...conspired with intent to obstruct the due course of justice"). These bare allegation, however, alone are insufficient to withstand a motion for summary judgment. Taken as a whole then, Goetz' affiidavit and other submissions to the Court, in addition to his Complaint, fail to establish a genuine issue of material fact with regard to whether the defendants reached agreement and conspired together to deprive him of any federal right.

Moreover, Goetz has failed to present this Court with any facts that would allow a jury to conclude that the defendants' actions toward him, if conspiratorial, were motivated by class-based invidious

discriminatory animus. See Lewellyn v. Raff, 843 F 2d 1103, 1117 (8th Cir 1988). The factual record supports only a conclusion that the defendants acted toward Goetz as an individual, not as some member or affiliate of a particular class. Even if the defendants acted wrongfully towards Goetz, being subjected to general tortious conduct does not fall within the protection of section 1985(2). See Griffin v. Breckenridge, 403 US 88, 101-2 (1971).

B. Claims Under Section 1985(3)

Goetz has also alleged a claim under 42 U.S.C. section 1985(3). In his Complaint, he claims that the defendants, except for defendant Long,

> conspired with intent...to deprive the plaintiff of the equal protection of state laws, and his federal Constitutional rights, liberties and freedoms (and) the conspiracy was founded upon invidious gender discrimination against a father attempting to enforce his rights and seek equal protecton of the laws.

Complaint, par. 16-17.

42 U.S.C. section 1985(3) provides in pertinent part:

> If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal priviledges and immunites of the laws;...[9]

To establish a violation of section 1985(3), a plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of person of the equal protection of the laws, or of equal priviledges and immunites under the laws; (3) an act in furtherance of

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[9] 42 U.S.C. section 1985 (3) further provides that for any conspiracy set forth in section 1985,

> if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object, whereby another is...deprived of having and exercising any right or priviledge of a citizen of the United States, the party...so deprived may have an action for the recovery of damages occasioned by such...deprivation, against any one or more of the conspirators.

Although these remedy provisions are set forth under section 1985 (3), they apply to every cause of action brought under section 1985.

the conspiracy; and (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. See Griffin, 403 US at 102-3. Each of these elements is essential and failure to establish one will preclude recovery.

Applying the proper summary judgment analysis, Goetz' cause of action founders on the second element. To successfully establish this element, Goetz must show that the conspiracy was motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." Id. at 102; see Great Am. Fed S & L v. Novotny, 442 US 366, 378 (1979); Lewis v. Pearson, 908 F 2d 318, 324 (8th Cir 1990). The Eighth Circuit has established the appropriate standard as follows:

> Most courts have extended protection to other suspect like classes, such as those based on religion, or those defined by ideology or the exercise of a fundamental right. The untimate test, of course, is whether the classification is sufficiently

"invidious" so as to fall within the statute's amibt.

Shortbull v. Looking Elk, 677 F 2d 645, 649 (8th Cir. 1982).

Goetz' Complaint and the current factual record do not establish a genuine issue of material fact as to the second element; there is nothing in the current record which would allow a jury to conclude that the defendants acted with a class-based animus. Although courts have recognized gender as a basis for section 1985(3) claims, see Lewis, 908 F 2d at 324 n.5 (collecting case), 325, a gender-based claim is appropriate only if the defendants' actions can be traced to some invidious classification. Here, as discussed supra, Part IV.A, the factual record commands a conclusion that the defendants' actions were based soley on Goetz as an individual. See Humphrey v. Court of Common Pleas of York Cty., 640 F Supp 1239, 1243 (M.D. Pa. 1986). Because Goetz as a matter of

law has not shown that the defendants' actions were based upon some classification, the conspiracy, if it existed, does not fall under the ambit of the statute. Accordingly, the court grants summary judgment in favor of the defendants on Goetz's claim under section 1985(3).

Even if Goetz had created a genuine issue of material fact on the second element of his section 1985(3) claim, the defendants would nonetheless be entitled to summary judgment because as with his section 1985(2)(II) claim, Goetz has not sufficiently established a genuine issue of material fact with regard to the "conspiracy" element of this section 1985(3) claim. See supra, Part IV.A.

V. Goetz' Motions for Summary Judgment

In response to the defendants' Motion to Dismiss, Goetz has filed four separate Motions for Summary Judgment. In those motions, Goetz seeks to have this Court

(1) void certain State court judgments which were issued in relation to the divorce proceeding and his subsequent State court lawsuit, (2) void the sale of the Homestead, and (3) award him right of title and occupancy. Having determined that the defendants are entitled to summary judgment on Goetz' claims, the Court will not pass on Goetz' motions for summary judgment.

The Court notes, however, that even if it were to pass on the motions, it would be without jurisdiction to void State court orders. Goetz did not name any of the issuing judges or other state officials in this action, nor did he seek such relief in his Complaint. See Flagg Bros. Inc. v, Brooks, 436 US 149, 157 (1978).

VI. Defendants' Motions for Sanctions

Both groups of defendants seek sanctions under Rule 11 of the Fed. R. Civ. P., on grounds that the Complaint was not grounded in fact, was interposed for the purpose

of harassment, and needlessly increased the costs of litigation. The motions are denied.

Conclusion

Based upon the records, filings and proceedings herein, and the briefs and arguments of Paul Goetz and counsel for the defendants, **IT IS ORDERED** that:

1. Plaintiff Paul Frederick Goetz' claims against defendant Merrill Lynch Operating Partnership, L.P. are DISMISSED WITHOUT PREJUDICE.

2. Defendant Marty Long's Motion for Summary Judgment (Doc. No. 3) is GRANTED;

3. Defendants Jean Tordoff, Harrison Tordoff, Kathryn R. Brush and James J. Lawton III Motion for Summary Judgment (Doc. No. 3) is GRANTED;

4. Defendants Allan R. King, Judith S. Pryor, and Kathy Madore's Motion for Summary Judgment (Doc. No. 6) is GRANTED;

5. Plaintiff Paul F. Goetz' Motions for Summary Judgment (Doc. Nos. 7, 8, 9, 10) are DENIED as moot;

6. Defendants Jean Tordoff, Harrison Tordoff, Kathryn R. Brush, Marty D. Long and James J. Lawton III Motion for Sanctions (Doc. No. 3) is DENIED;

7. Defendants Allan R. King, Judith S. Pryor, and Kathy Madore's Motion for Sanctions (Doc. No. 6) is DENIED; and

8. Plaintiff's claims against defendants Jean Tordoff, Harrison B. Tordoff, Kathryn R. Brush, Marty D. Long, James J. Lawton III, Allan R. King, Judith S. Pryor and Kathy Madore are DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: February 9, 1993

RICHARD H. KYLE
U.S. District Judge

Filed: February 10, 1993

Francis E. Dorsal
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Paul Frederick Goetz,

Plaintiff),

vs.

Civ. No. 3-92-641
MEMORANDUM OPINION AND ORDER

Jean Tordoff, et al.,

Defendants.

Before the Court is plaintiff Paul Frederick Goetz' Motion to Open and Amend the Judgment entered on February 10, 1993. By this motion, Goetz seeks an order vacating that portion of the Order dismissing Goetz' claims under 42 U.S.C. 1983, and permitting Goetz to file an Amended Complaint. In the Alternative, Goetz seeks an order "reopening" the February 10, 1993, Order and "reconsidering" the Complaint.

Certain of the defendants contend that Goetz' Motion to Open and Amend the Judgment is untimely, a contention which

Goetz disputes. Having decided Goetz' motion on the merits, the Court need not, and has not, determined whether the motion herein was timely.

Based upon the records, files, and proceedings herein, Goetz' Motion to Open & Amend the Judgment entered on February 10, 1993 (Doc. No. 29) is DENIED.

Dated: March 9, 1993

RICHARD H. KYLE
United States
District Judge

United States District Court

District of Minnesota

Third Division

Paul Frederick Goetz,

Civ. 3-92-641

Plaintiff,

v.

COMPLAINT

Jean Tordoff, Harrison B. Tordoff, Kathryn R. Brush, Allan R. King, Judith S. Pryor, Kathy Madore, Merrill Lynch Realty Operating Partnership, L.P., James J. Lawton III, and Marty D. Long.

Defendants.

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1. This action arises under the Civil Rights Act, 42 U.S.C. section 1983, 42 U.S.C. section 1985 (2), 42 U.S.C. section 1985 (3), and 42 U.S.C. section 1988, as hereinafter more fully appears.

2. The Plaintiff requests a jury trial in this action.

3. That Plaintiff, Paul Frederick

Goetz, is currently a resident of Hennepin County, and, at all times relevant hereto, a resident of the state of Minnesota.

4. That upon information and belief, defendants Jean Tordoff and Harrison B. Tordoff are husband and wife, and are residents of the state of Minnesota in the county of Ramsey.

5. That upon information and belief, and at all times relevant hereto, defendant Kathryn R. Brush is a resident of the state of Minnesota.

6. That upon information and belief, defendant Allan R. King is a resident of the state of Minnesota, and, at all times relevant hereto, a licensed real estate agent.

7. That upon information and belief, defendant Judith S. Pryor is a resident of the state of Minnesota, and, at all times relevant hereto, a licensed real estate agent.

8. That upon information and belief,

defendant Kathy Madore is a resident of the state of Minnesota, and, at all times relevant hereto, a licensed real estate agent, and employed as an office manager by Merrill Lynch Realty Operating Partnership, L.P.

9. That upon information and belief, at all times relevant hereto, until on or about February 21, 1990, defendant Merrill Lynch Realty Operating Partnerhip L.P., was a Delaware Limited Partnership, operating a principle place of business in Minnesota under the assumed name of Merrill Lynch Realty, in various branch locations, and headquartered at 1501 W. 80th St., Bloomington, Minnesota.

10. That upon information and belief, at all times relevant hereto, defendant James J. Lawton III is a resident of the state of Minnesota, and a licensed attorney in that state.

11. That upon information and belief, and at all times relevant hereto, defendant

Marty D. Long is a resident of the state of Minnesota.

12. That the defendants have interfered with, obstructed, and deprived the plaintiff of exercising his constitutionally protected rights, freedoms, and liberties, in the free use, enjoyment, and disposal of his homestead property located at 638 Holly Avenue, St. Paul, Minnesota.

13. That the defendants have interfered with, obstructed, and deprived the plaintiff of exercising his federally protected freedom to contract, in regard to his homestead property located at 638 Holly Avenue, St. Paul, Minnesota.

14. That the defendant's have acted under color of state law, including but not limited to court orders of November 2, 1989, November 7, 1989, January 24, 1990, February 9, 1990, and May 3, 1990.

15. That the defendants have acted with intentional and reckless disregard for the plaintiff's civil rights, and,

with the exception of Marty Long, have acted with malicious intent.

16. That the defendants, with the exception of Marty Long, conspired with intent to obstruct the due course of justice in a state court proceeding, and to deprive the plaintiff of the equal protection of the property laws and dissolution laws of the state of Minnesota, and his federal Constitutional rights and liberties.

17. That the conspiracy was founded upon invidious gender discrimination against a father attempting to enforce his rights and seek equal protection of the laws.

18. That, commencing approximately February 1, 1990, defendants Jean Tordoff, Harrison B. Tordoff, Kathryn R. Brush, Allan R. King, Judith S. Pryor, Kathy Madore, Merrill Lynch Realty Operating Partnership L.P. and James J. Lawton III intentionally and maliciously withheld and concealed information regarding the marketing of the plaintiff's property, and of persons

attempting to buy the property.

19. That, specifically, the defendants named in #18 fraudulently concealed a Purchase Agreement offer made by Paul Eusterbrock and Ruth Fen, husband and wife, on February 5, 1990, in an office of Merrill Lynch Realty, and concealed the prospective buyer's earnest money check of $3500, also written on February 5, 1990, and presented on that date to defendants Judith Pryor and Merrill Lynch Realty.

20. That, on February 9, 1990, while concealing information and documents regarding the marketing and attempted sale of his homestead, including that specified in #19, defendants Allan R. King and Kathy Madore, upon direction from the Merrill Lynch corporate office, refused to give the plaintiff any information or documents in their possession, ordered the plaintiff out of a Merrill Lynch office, and threatened to call the police if he returned, while the plaintiff was simply attempting to

obtain information to utilize in a pending state action.

21. That, the defendants named in #18 conspired to later forge the dates on the Purchase Agreement, and the earnest money check, to make them appear to have been made on February 15, 1990 instead of February 5, 1990, and such was done by defendant Judith S. Pryor.

22. That the actions of the defendants were taken as part of a scheme to conceal the fact that, Allan R. King, Judith S. Pryor, Kathy Madore, Merrill Lynch Realty, and its other agents, acting under color of a January 24, 1990 order, were actually marketing the plaintiff's property on behalf of defendants Jean Tordoff and Harrison Tordoff, and not the plaintiff, and to steal the sale proceeds from an FHA loan, to then launder the money out of a pending state action and to public assistance recipient Kathryn Brush via Jean Tordoff and Harrison Tordoff acting as straw buyers,

and avoid any accounting or record of the proceeds in the pending state action.

24. That, in the furtherance of the scheme and its cover-up defendant Allan R. King later forged the date on a Listing Contract for the marketing of the plaintiff's homestead, entered into between himself and defendants Jean Tordoff and Harrison Tordoff on February 6, 1990 to make it appear as if the contract was made on February 15, 1990.

25. That, in the furtherance of the scheme and its cover-up, defendants Allan R. King and Judith S. Pryor submitted three affidavits containing patently false information and material misrepresentations, dated June 25, 1990, and September 20, 1990, to a Ramsey County District Court.

26. That, acting under color of a February 9, 1990 state court order, and other subsequent state court orders, in approximately June 1990, defendant Marty Long took possession of the property, and

has since deprived the plaintiff of all of his federally protected rights and liberties included in the beneficial use, possession, and enjoyment of his homestead property.

WHEREFORE, plaintiff prays for the following relief:

1. A declaratory judgment, declaring the property located at 638 Holly Avenue, St. Paul, Minnesota, to be solely the homestead property of the plaintiff, declaring plaintiff's right to possession, and declaring that any and all claims, rights, and recordings of documents by the defendants, their assigns, their transferee's, their heirs, and any rights claimed by any persons, organizations, or institutions, by virtue of the defendants actions, are void, in violation of the plaintiff's federally protected fundamental constitutional rights and liberties.

2. A judgment in favor of the plaintiff

for the sum of $2,000,000 for costs, damages for severe emotional distress, and for punitive damages.

3. For any other such relief as the Court may deem just and appropriate.

Dated: September 18, 1992

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No. 93-1842MNST

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

PAUL FREDERICK GOETZ,

Appellant,
(plaintiff),

vs.

JEAN TORDOFF, HARRISON B. TORDOFF, KATHRYN R. BRUSH, ALLAN R. KING, JUDITH S. PRYOR, KATHY MADORE, MERRILL LYNCH REALTY OPERATING PARTNERSHIP, L.P.,JAMES J. LAWTON III, AND MARTY D. LONG,

appellees,
(defendants).

On Appeal from United States District Court
District of Minnesota

BRIEF FOR APPELLANT

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SUMMARY OF THE ARGUMENT

There are three central issues in this appeal. The first involves notice requirements: the 10 day requirement contained in Rule 56 (c) of the Fed. R. Civ. P., and, the fundamental requisites of notice and opportunity to be heard, contained in the due process clause of Amendment V of the United States Constitution.

It is well settled in this circuit, as well at others, that if district court converts a motion to dismiss into one for summary judgment, the court must notify the parties at least 10 days prior to the hearing, pursuant to Rule 56 (c). In this case, the plaintiff was never notified at all.

Also, in order to win a judgment of dismissal, as did Merrill Lynch, it seems that they should have to make an appearance in the case, and serve notice of motion and motion, stating what they are contending. How can one defend against a phantom?

The second issue has to do with deciding when private parties are liable under 42 U.S.C. 1983. There is no precise formula. And, although the plaintiff did not name any state actors in his original complaint, the defendants have obviously received so much judicial aid in the form of usurpation and abuse of power, there are clearly genuine issues of material fact for a jury as to whether the defendants have received significant aid of state officials. And the conclusion of district court in that respect is clearly erroneous.

The plaintiff has a valid Contract For Deed for his homestead property in accordance with the laws established by the Minnesota State Legislature and the Governor. However, a handful of state judges refuse to allow the plaintiff to occupy his homestead. And, in order to assist defendant Long in continuing to occupy the property, have engaged in an assortment of tactics ranging from issuing

orders expressly prohibited by statute, in contravention of public policy, and the doctrine of illegal contracts, to refusing to adjudicate the plaintiff's written motions, and kicking him out of the Minnesota Court of Appeals without an opportunity to be heard. How much more aid can a state give?

And the third issue is the denial of the plaintiff's post-judgment motion for leave to amend. There are no reasons given, and the denial is in conflict with both the spirit of the Fed. R. Civ. P. and the legislative intent and purpose of the Civil Rights Act and 42 U.S.C. 1983, and clearly an abuse of discretion.

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No. 93-1842MNST

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

PAUL FREDERICK GOETZ,

Appellant,
(plaintiff),

vs.

JEAN TORDOFF, HARRISON B. TORDOFF, KATHRYN R. BRUSH, ALLAN R. KING, JUDITH S. PRYOR, KATHY MADORE, MERRILL LYNCH REALTY OPERATING PARTNERSHIP, L.P.,JAMES J. LAWTON III, AND MARTY D. LONG,

appellees,
(defendants).

On Appeal from United States District Court
District of Minnesota

REPLY BRIEF FOR APPELLANT

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SUMMARY OF THE ARGUMENT

The plaintiff has clearly stated an actionable claim under a number of tests of the Supreme Court. District court has simply erred in analyzing the connections between the defendants and the State, and in it's conclusions of what constitutes a 'state actor' under a variety of Supreme Court guidelines.

The lack of notice of the conversion of the defendants' motions into ones for summary judgment is plain error, and also results in a deprivation of property without due process of law.

The manner in which the case was disposed has left an extremely incomplete record, relying mostly on dubiously bald recitations from state orders, and unsubstantiated misstatements of both law and fact by the defendants. And, it has deprived the plaintiff of the opportunity to fully develop issues.

There are no defects in the original COMPLAINT to begin with, the defendants are 'state actors', and the FIRST AMENDED

COMPLAINT simply redefines and expands the issues. It is clear, from the lack of reasons given, that district court had no sound reason to deny leave to amend.

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No. 93-1842MNST

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

PAUL FREDERICK GOETZ,

Appellant,
(plaintiff),

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JEAN TORDOFF, HARRISON B. TORDOFF, KATHRYN R. BRUSH, ALLAN R. KING, JUDITH S. PRYOR, KATHY MADORE, MERRILL LYNCH REALTY OPERATING PARTNERSHIP, L.P.,JAMES J. LAWTON III, AND MARTY D. LONG,

appellees,
(defendants).

On Appeal from United States District Court
District of Minnesota

APPELLANT'S PETITION FOR REHEARING & SUGGESTION FOR REHEARING EN BANC

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SUMMARY

District Court committed clear reversible error in entering summary judgment, sua sponte, without actual notice & prior to any discovery, in dismissing the complaint for defective service against a party who made a voluntary appearance with counsel, in it's interpretations of state law, and, in denying leave to amend with no apparent or given reasons.

And, in affirming, the panel has ruled in direct conflict with binding precedents of the Supreme Court and other panel decisions of this circuit. It has ruled in direct conflict with binding precedents of the Minnesota Supreme Court on several issues of state law, and in direct conflict with the Supreme Court regarding the binding affect of state law and de novo review.

The panel has failed to specifically address any of the 12 Supreme Court decisions,

or the 11 panel decisions of this circuit, or the 2 Minnesota Supreme Court cases cited by the appellant in support of the appeal. And, the panel has not offered any Minnesota Supreme Court citation to support it's rulings on matters of state law.

For the sake of continuity and harmony, and in the interests of justice, the panel decision should be vacated, and district court's decisions reversed.

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STATEMENT OF THE ISSUES

1. WHETHER THE PANEL DECISION REGARDING THE REQUISITE NOTICE BEFORE IT IS APPROPRIATE FOR DISTRICT COURT TO ENTER SUMMARY JUDGMENT IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT.

   Tulsa Collection Serv. v. Pope, 485 US 478 (1988).

   Mennonite Board of Missions v. Adams, 462 US 791 (1983).

   Peralta v. Heights Medical Center, 485 US 80 (1988).

Celotex Corp. v. Catrett, 477 US 317 (1986).

2. WHETHER THE PANEL DECISION REGARDING THE REQUISITE NOTICE OF CONVERSION OF MOTIONS TO DISMISS INTO ONES FOR SUMMARY JUDGMENT IS IN DIRECT CONFLICT WITH OTHER PANEL DECISIONS OF THIS CIRCUIT.

Court v. Hall County, 725 F 2d 1170 (1984).

Jensen v. Klecker, 599 F 2d 243 (1979).

Winfrey v. Brewer, 570 F 2d 761 (1978).

Ailshire v. Darnell, 508 F 2d 526 (1974).

3. WHETHER THE PANEL DECISION REGARDING ADEQUATE TIME FOR DISCOVERY BEFORE IT IS APPROPRIATE FOR A DISTRICT COURT TO ENTER SUMMARY JUDGMENT IS IN DIRECT CONFLICT WITH THE SUPREME COURT.

Celotex Corp. v. Catrett, 477 US 317.

4. WHETHER THE PANEL DECISION REGARDING INTERPRETATIONS AND DE NOVO REVIEW OF BINDING STATE LAW IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT AND OTHER DECISIONS OF THIS CIRCUIT.

Salve Regina College v. Russell, 499 US 225 (1991).

Gumersell v. Director, Fed. Emergency

Mgt. Agency, 950 F 2d 550 (1991).

Garnac Grain Co. v. Blackley, 932 F 2d 1563 (1991).

Bituminous Casualty Corp. v. Tonka Corp., sl. op. 92-3187 (8th Cir. 11-12-93).

5. WHETHER THE PANEL DECISION REGARDING "STATE ACTION" NECESSARY TO SUPPORT A 42 U.S.C. SECTION 1983 CLAIM IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT.

Connecticut v. Doehr, 111 S Ct 2105 (1991).

Tulsa Collection Serv. v. Pope, 485 US 478 (1988).

Lugar v. Edmondson, 457 US 922 (1982).

6. WHETHER THE PANEL DECISION REGARDING DISMISSAL FOR DEFECTIVE SERVICE AFTER A PARTY HAS VOLUNTARILY APPEARED WITH COUNSEL IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT.

Knox v. Summers, 3 Cr 496, 2 L Ed 510 (1806).

Farrar v. United States, 3 Pet. 459.

Gracie v. Palmer, 8 Wheat. 699.

Jones v. Andrews, 10 Wall. 327.

7. WHETHER THE PANEL DECISION REGARDING ABUSE OF DISCRETION IN DENYING LEAVE TO AMEND IS IN DIRECT CONFLICT WITH THE SUPREME COURT.

Foman v. Davis, 371 US 178 (1962).

Gillespie v. U.S. Steel Corp., 379 US 148 (1964).

U.S. v. Hougham, 364 US 310 (1960).

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